

NATURAL RESOURCES COMMISSION

Minutes - October 26, 1999

MEMBERS PRESENT

Michael J. Kiley, Chair
Larry Macklin, Secretary
John Goss
Damian Schmelz
Rick Cockrum
Terri Moore
David Hensel

NATURAL RESOURCES COMMISSION STAFF PRESENT

Steve Lucas
Jennifer Kane
Tawnya Whittington

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

David Vice	Executive Office
Jack Costello	Executive Office
Paul Ehret	Executive Office
Carrie Doehrmann	Executive Office
Angie James	Executive Office
Brent Shike	Executive Office
Mickey J. James	Executive Office
John Davis	Land Acquisition
Pat Malone	Outdoor Recreation
Emily Kress	Outdoor Recreation
Susanna Arvin	Outdoor Recreation
Mark Reiter	Fish and Wildlife
Randy Lang	Fish and Wildlife
Glen Salmon	Fish and Wildlife
Rachel Perry	Museums
Mike Neyer	Water
Lee Casebere	Nature Preserves
Ihor Boyko	Legal
Trina Ray	Legal
Marcella Fane	Legal
Greg Ellis	Legal
Terence Slywka	Legal
Lt. Greg Dye	Law Enforcement
Lt. Col. Jeff Wells	Law Enforcement
Col. Larry Allen	Law Enforcement

Steven Gerber Law Enforcement
Jerry Pagac State Parks and Reservoirs
Jim Slutz Oil and Gas

GUESTS

Max Goodwin
Cedric Hustace
Robert P. Walters
Steve Hornbeck
John Updike
J.D. Van Hooser
Roy Schwomeyer
Dana Meier
Mike Graham

MONTHLY REPORTS

Michael J. Kiley, Chair, called to order the regular monthly meeting of the natural resources commission at 10:04 a.m., on October 26, 1999 in the Matthew Welch Room of the Indiana State Museum, Indianapolis. With the presence of seven members, the chair observed a quorum.

Damian Schmelz moved to approve the minutes of September 21, 1999. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Larry Macklin provided the Director's report. Macklin stated that the Interim Study Committee met for the last meeting and that the report will be finished and provided to LSA. He said it is likely that the DNR will not have any new legislation. He said the Directors' Meeting was held at Spring Mill a few weeks ago, and Bob Waltz was named Director of the Year. Macklin said numerous good ideas were discussed at this meeting.

Director Macklin indicated that the Lilly Endowment for the new State Museum would total \$21.8 million. He said there would be private funding for the exhibits. Macklin also shared that he will be traveling to New York tomorrow for meetings to get a true look at how the exhibits will look. He stated that he will not bring that information to the Commission until the final process is finished.

Jack Costello, Deputy Director for the Bureau of Lands and Cultural Resources, reported the Advisory Council met at the Falls of the Ohio, and the meeting was very informative. Costello said his Bureau put together an excellent publication of Historic Sites in Indiana. He also said that, "we have completed a good recreation season."

Paul Ehret, Deputy Director for the Bureau of Resource Regulation, said the Advisory Council for Water and Resource Regulation did not meet in October, but there is a meeting scheduled for November 4, 1999 at the Indiana State Museum. Ehret also indicated the Division of Water is close to releasing the engineering report on Sylvan Lake. He stated there are concerns regarding the integrity of the structure, and the DNR is looking to the Army Corps of Engineers for assistance.

Ehret reported the Division of Water is pursuing a major reorganization. "It is a very intriguing and innovative way of organizing." He suggested the NRC might find a report on the reorganization to be interesting.

Ehret reported the Division of Reclamation won its second State Quality Award. He said, "this is a wonderful thing for the division."

David Vice, Deputy Director for the Bureau of Resource Management, said, "business has been fairly routine" during the month of October. He noted the Division of Law Enforcement and the Division of Fish and Wildlife have been preparing for the hunting season. Vice said he would be attending the Midwest Directors Conference in Little Rock, Arkansas next month.

BUREAU OF LANDS AND CULTURAL RESOURCES PERMANENT APPOINTMENTS AND PERSONNEL INTERVIEW

Personnel Interview for Lanier Mansion State Historic Site

Terri Moore presented this item. She said, "as always, we have extremely qualified candidates." She reported that after deliberations the Personnel Committee determined to recommend John Clerkin be selected as the Assistant Curator of the Lanier Mansion State Historic Site in Madison.

John Goss moved to approve John Clerkin as the Assistant Curator of the Lanier Mansion State Historic Site. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

DIVISION OF NATURE PRESERVES

Consideration of the Dedication of Chamberlain Lake Nature Preserve in St. Joseph County

Lee Casebere of the DNR's Division of Nature Preserves presented this item. He said Chamberlain Lake Nature Preserve is an 82.5-acre tract of land located in west central St. Joseph County. He explained Chamberlain Lake is a shallow basin with little open water during much of the year. As the water level recedes during the course of a normal year, interesting wetland communities develop including muck flats and floating mats of

vegetation. Several of the wetland plants growing here are rare species in Indiana. Included among the unusual species here is dwarf umbrella sedge, warty panic grass, pipewort, purple bladderwort, spatulate-leaved sundew, and black fruited spikerush. The Division of Nature Preserves recently entered into a cooperative agreement with the St. Joseph County Parks and Recreation Department. They have installed a parking lot and trail and will continue to maintain the site, "which will be a win-win situation for the DNR." The St. Joseph County Parks and Recreation Department plan to use the area in association with their interpretive nature programs.

Damian Schmelz moved to approve the dedication of Chamberlain Lake Nature Preserve. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

DIVISION OF OUTDOOR RECREATION

Information Item: Follow-up Report on the Indiana Participation Survey--Results of the Black Expo Survey Conducted at the Request of the NRC

Susanna Arvin of the Division of Outdoor Recreation presented this item. She said that, at the request of the Commission, a random survey was conducted at Black Expo to determine recreational priorities in the African American community. Arvin indicated there were 205 people surveyed at the Black Expo, and the top three activities were walking, hiking and jogging, and court sports. She said the survey showed participants preferred walking for pleasure, casual bike riding, wildlife viewing, and relaxing in the out of doors. Basketball was the number one active sport, with baseball and softball also being priorities. Those who go camping prefer to go tent camping, and the most favored watercraft is the personal watercraft. Hunting is a low priority, and fishing is pursued mostly along the banks of ponds or lakes.

Arvin said it should be noted that the respondents at the Black Expo said they are more likely to use public recreation facilities as opposed to private and personal properties. The participants indicated they would be willing to drive up to an hour to participate in outdoor recreation activities. The respondents indicated that "lack of time" is a major factor restricting participation in outdoor recreational activities.

John Goss urged the Division of Outdoor Recreation to consolidate the results of the Black Expo survey into a report. Arvin responded that the Commission would be receiving the draft SCORP in the near future. The SCORP would provide a very extensive report on recreational demands and uses in Indiana. Reference to the Black Expo survey would be included in the draft SCORP.

Chairman Kiley reported that, because this item was for informational purposes, no vote was required.

DIVISION OF STATE PARKS AND RESERVOIRS

Informational Item: Report on the Status of the Mississinewa Dam

Jerry Pagac opened this informational item. He said for discussion was settling of the Mississinewa Dam and the problems it will pose. Pagac introduced John Updike, a member of the U.S. Army Corps of Engineers for the Upper Wabash Valley, to better explain the problem.

Updike said, "there are rumors about the dam leaking." He said the rumors are true, but because the dam is designed to leak to a certain degree to prevent pressure from building up. The problem that the Corps is looking at is the settling of the dam, and in some areas there have been up to ten inches of settling.

Steve Hornbeck from the U.S. Army Corps of Engineers displayed slides that helped outline findings concerning the dam. He said the dam is 8,100 feet long and was placed into operation in April 1968. He indicated the problem with settling is there is a soil layer above the rock foundation. Currently the Corps is using movement markers, which are set deeply in the ground, to monitor settling of the dam. Presently, the settling does not pose an emergency problem. He reported funding should be available in the year 2002, and construction would take approximately two years. Currently, the lake is at winter pool, and the Corps is conducting testing. Hornbeck said a decision whether to return Mississinewa Dam to ordinary pool in the spring of 2000 will be reached as soon as practicable.

Chairman Kiley voiced concerns regarding the decision on whether or not the lake would be brought to summer pool. He said the decision should be made as soon as possible so citizens can decide what to do with their boats. Kiley emphasized that the marina operators will be affected by the decision, and they will need sufficient lead-time to minimize the negative impacts on their businesses. Also, if the lake is not brought up to summer pool, the usage on other natural lakes will be increased, and the DNR will need to be prepared for that situation.

Rick Cockrum questioned, "if this is not an emergency situation, why can you not bring the lake up to summer pool next year?" Hornbeck said returning to summer pool could cause instability in the dam. Cockrum asked if the timetable would be moved up if this situation became an emergency. Hornbeck stated there are discretionary funds in Washington, D.C. that could be made available if an emergency arises. In response to a question, Hornbeck estimated repair costs at \$1,000,000 for each 100 feet of treatment. Estimates for the amount of treatment required vary from 500 to 1,500 feet.

Pagac said if the lake is between four and ten feet below the summer pool, the marinas will be affected and there will be no beach, but the public could still use some of the benefits the area has to offer. If the lake is more than ten feet below summer pool, the public will not be permitted access due to safety factors.

**BUREAU OF RESOURCE MANAGEMENT
DIVISION OF FISH AND WILDLIFE**

**Consideration of a Request to Stock Brown Trout in the East Fork of the
Whitewater River between the Brookville Reservoir Dam and the Confluence with
the West Fork**

Rick Cockrum said this information item was placed on the agenda at his request. He reflected the proposal should only be implemented if the biology makes sense and if it enjoys public support.

Rob Walters then presented this item. He said the proposal is to stock fingerling brown trout in the East Fork of the Whitewater River between the Brookville Reservoir dam and the confluence with the West Fork ("tailwater"). At one time brown trout were stocked in the tailwater. Because these fish are more temperature tolerant, they survived from year to year. Walters expressed the opinion the tailwater is a quality brown trout environment. In the mile of river there is the temperature, depth variation, cover, and food needed to support an excellent brown trout population. The tailwater has two clearly identifiable limits: upstream to the dam, and downstream to the confluence with the West Fork. The land immediately below the dam is federal property. Downstream to the confluence, the shore is park property. There is an excellent road network that exists throughout, enabling broadcast stocking as well as angler and law enforcement access.

Walters acknowledged his organization needs permission to stock brown trout. He also outlined other needs: (1) A biologist's opinion should be obtained as to how many fingerlings are adequate. (2) Rules should be implemented to protect the fish (possibly "catch and release"). (3) Signage should be erected for notice to fishermen and other river users as to the presence of brown trout. (4) At least minimal flow must be maintained to help the fish survive in the warm months.

Walters indicated his organization is not seeking state funding, because the project would be privately funded, making it "a win-win situation." He said that given adequate signage, these fish could be stocked within the fall timeframe. This strategy would reduce the impact on the current rainbow trout stocking program. In regard to impact on native species, the only native species in the tailwater are rough fish, which are extremely durable and do not compete for the same food. He stated this program would be low cost, low risk and have outstanding economic benefits. There would also be tax and fee benefits to local and state government. These benefits would include a greater number of nonresident fishing licenses and trout stamps being sold. Ultimately, park usage fees could be designed to capture more revenue.

**Consideration of a Request by Williams Communications, Inc. (d/b/a Vyvx, Inc.) for
Installation of a Fiber Optic Transmission Line through Splinter Ride Fish and
Wildlife Area**

Mark Reiter of the Division of Fish and Wildlife presented this item, which he said had been deferred from the August and September Commission meetings. For consideration is a request by Williams Communications, Inc. for installation of a fiber optic transmission line through Splinter Ridge Fish and Wildlife Area. Reiter said the Division of Fish and Wildlife recommends approval with one of the conditions being that a fee is to be paid for disturbance of the fish and wildlife area. The Commission had deferred this item while waiting for an amount to be agreed upon regarding the compensation and easement fee. Reiter recommended there be an easement fee of \$13,160, along with compensation for damages to real estate of \$9,890, for a total amount of \$23,050. He reflected that these calculations were made in concert with John Davis, Director of the Division of Land Acquisition.

Damian Schmelz moved to approve the request for installation of a fiber optic transmission line through Splinter Ridge Fish and Wildlife Area upon the terms and conditions recommended by the Division of Fish and Wildlife. The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

LEGAL PROCEEDINGS

Consideration of Report, Findings of Fact, and Conclusions of Law with Nonfinal Administrative Judgment of the Administrative Law Judge and Modified Findings of Fact, Conclusions of Law, and Nonfinal Order of the Administrative Law Judge in the matter of Thomas W. Roberts, d/b/a Enterprise Oil & Associates v. Department of Natural Resources, Division of Reclamation and Black Beauty Coal Company; Administrative Cause Number 94-203R

Steve Lucas, Administrative Law Judge, introduced this item. He said for consideration are findings of fact, conclusions of law, and a nonfinal order in the matter of Thomas W. Roberts, d/b/a Enterprise Oil & Associates v. Department of Natural Resources and Black Beauty Coal Company. At issue is a surface coal mining permit for which the DNR's Division of Reclamation gave initial approval in favor of Black Beauty. The surface coal mine is located in Owen County. Enterprise Oil has a gas well at the site in lawful, temporary abandonment status, and also claims petroleum leases both inside and adjacent to the permitted mining area. Black Beauty claims the right to coal interests on the same real estate. He said the case covers a breadth of issues, some of which have not previously been before the Commission.

Lucas indicated that a correction needed to be made to Finding 59 of his July 12, 1999 report. The Arabic numeral "300" should be changed to "150." This correction is for the boundaries of a safety zone for surface coal mining activities conducted near oil or gas wells. He said the correction is the primary reason the findings of June 9 were modified to the findings of July 12, 1999.

Lucas explained there were seven topics considered in the case and they are as follows:

- A. Administrative review applied to Black Beauty's I-SMCRA Permit. This topic provides the legal foundation for administrative review and special responsibilities placed on the Commission's ALJs regarding the collection of precedents and the response to administrative decisions cited by the parties.
- B. Standing by Enterprise Oil to Obtain Administrative Review. Enterprise Oil may claim "standing" based upon its ownership of a gas well and its assertion of ownership to a petroleum easement. Federal SCMRA and Indiana SMCRA has been construed by the courts to provide a very liberal view of standing to pursue administrative review.
- C. Entitlement by Enterprise Oil to Notice of Permit Application Submission. This topic considers an interpretation of several sections within Indiana SMCRA and what obligations are placed, upon an applicant for a surface coal mine permit, to provide notification to interested persons before the DNR acts upon the application. The findings conclude the recordation of petroleum leases was sufficient to entitle Enterprise Oil to receive notice because Enterprise Oil was the holder of record of a "leasehold interest."
- D. Failure to Provide Enterprise Oil with Pre-Notice Cured by Administrative Review. This topic concludes even though Enterprise Oil was entitled to notice--notice that was not received in the form anticipated by the statute--the error was cured. DNR advised Enterprise Oil of the pending issuance of the surface coal mining permit, and Enterprise Oil was provided an opportunity to initiate the instant administrative review.
- E. Conditioning of Black Beauty's I-SMCRA Permit to Protect Oil and Gas Production Leaseholds from the Conduct of Surface Coal Mining Operations. The determination is that a time-honored common law concept defining the relationship among competing mineral users still holds, and the concept has not been superseded by Indiana SMCRA. This concept is called the "rule of reason".
- F. Conditioning of Black Beauty's I-SMCRA Permit to Protect Squire's #1 Well from the Conduct of Surface Coal Mining Operations. Squires #1 well is located within the same geographic area as Black Beauty's SMCRA permit. The SMCRA permit does not specify a distance Black Beauty must stay from the well, although, DNR's Division of Reclamation did treat the well as an "uncontrolled structure" (in other words, in the same way it would treat a building not owned by Black Beauty, requiring a 100-foot barrier). The findings before the NRC determine there is a safety barrier around oil and gas wells to protect them from the hazards generally applicable to oil and gas wells. The barrier recognized by federal statute at 30 USC 877 (a) provides for a 300-foot diameter safety zone for both surface and underground mines. The federal statute recognizes there may be site-specific circumstances that would warrant a greater or lesser safety zone, but there are no extraordinary facts in the present case to warrant deviation from the ordinary 300-foot diameter safety zone with respect to Squires #1 well.

- G. Conditioning of Black Beauty's I-SMCRA Permit Relative to Thatcher #1 Well and Thatcher #2 Well. In regard to these two exploratory wells, the findings provide that the "rule of reason" mentioned previously applies to the Thatcher wells.

Lucas said that based upon these findings of fact and conclusions of law, he entered a nonfinal order that affirms issuance of the Indiana SMCRA permit to Black Beauty but additionally requires:

1. Black Beauty shall not interfere with the lawful exercise of the rights of others whom may own petroleum leasehold interests. Black Beauty shall conduct its activities exercising reasonable care that it does not interfere with these activities.
2. In the absence of a safety assessment supporting a zone other than 300 feet in diameter (or, alternately stated, a 150 foot radius), Black Beauty shall stay 150 feet away from Squires #1 Well.

Lucas said the parties are each represented by counsel knowledgeable in natural resources law and administrative law. The counsel will argue objections to the findings, conclusions and nonfinal order on behalf of their respective clients.

Max Goodwin presented his objections on behalf of Thomas Roberts. Goodwin stated that, "the Administrative Law Judge set out a very well-reasoned set of findings." Goodwin said he has no dispute regarding the fact that no notice was given to Mr. Roberts, concurring with the ALJ that the error was corrected by providing a complete AOPA proceeding. Goodwin said his main objection to the findings is that the safety zone should be a 300-foot radius rather than 150-foot. If a well is vented, there is a tremendous amount of pressure being released. He said a 300-foot radius is a safer distance in the event of a breach, but he believed his client could also "live with" a 150-foot radius buffer zone.

Chairman Kiley asked if the well is highly pressurized and if it had a regulator. Goodwin indicated it does have a great amount of pressure, but he could not immediately recite the numbers. The well does have a regulator. Goodwin also indicated there is a lock on the well to discourage a trespasser from opening it.

Trina Ray presented argument on behalf of the DNR. She said the DNR generally supports the ALJ's July findings of fact, conclusions of law, and nonfinal order. Ray emphasized that the Administrative Law Judge upheld the issuance of Black Beauty's permit and clarified the decision with respect to a safety zone (with a 150-foot radius, as opposed to a 300-foot radius).

Cedric Hustace presented objections on behalf of Black Beauty Coal Company. Hustace said he generally wished for the Administrative Law Judge's findings to be upheld. He did, however, express objection to Finding 58 and 59. Hustace argued *Richardson v.*

Citizens Gas & Coke Utility, 422 N.E.2d 704, 713 (Ind. App. 1981), was not on point because it applies only to underground coal mines. Hustace said Black Beauty had completed mining at the site without incident, and the company does not want anything to suggest it did not comply with all current laws.

Chairman Kiley congratulated the parties on presenting reasoned arguments. He asked if there was any Commission discussion or if the item was ready for a vote.

Damian Schmelz moved to approve the Administrative Law Judge's Modified Findings of Fact, Conclusions of Law, and Nonfinal Order of July 12, 1999 (with the correction identified by the Administrative Law Judge to Finding 59). The motion was seconded by Terri Moore. Upon a voice vote, the motion carried.

Consideration of Report, Findings of Fact, and Conclusions of Law with Nonfinal Administrative Judgment of the Administrative Law Judge in the matter of Rose Acre Farms, Inc., v. Jackie Ault and James Curry: Administrative Cause Number 98-026F

The Chair reported this item deferred until the December 1999 meeting.

Consideration of Report, Findings of Fact, and Conclusions of Law with Nonfinal Administrative Judgment of the Administrative Law Judge in the matter of Steven T. Gerber v. Department of Natural Resources; Administrative Cause Number 98-157L

Steve Lucas, Director of the Division of Hearings, introduced this item. He said that for consideration is administrative review from a letter of reprimand issued to Indiana Conservation Officer Steven T. Gerber. He reminded the Commission that, as with all personnel disputes from the Division of Law Enforcement the case was heard by a panel, including Conservation Officers and one representative from the Division of Hearings. A majority of the panel voted to affirm the letter of reprimand, but Lucas said there was also a dissenting opinion. He indicated Ihor Boyko represented the DNR, and ICO Steven Gerber appeared in person.

Ihor Boyko presented arguments on behalf of the DNR. Boyko referenced a letter written by Mike Onyon, Safety Director for LeMaster Steel Erectors, Inc., regarding the incident that led to the letter of reprimand. Boyko said he believed the decision of the panel should be upheld, and the letter of reprimand should remain in the personnel file of ICO Gerber.

ICO Gerber presented objections to the Commission on his own behalf. Gerber indicated the matters contained in the letter by Mike Onyon were inflammatory and false. He said he has been an Indiana Conservation Officer for 19 years, and he understands the disciplinary process has many problems. Gerber said he requested many meetings with Director Macklin and was continually denied at the law enforcement level. Gerber said he objected to allowing Lt. Col. Wells to hear all evidence before the hearing and then sit on

the panel. Gerber said the process is intended to be unbiased, but he asked how Lt. Col. Wells could be unbiased? Gerber said discipline is supposed to be progressive and "should fit the crime," but he received no verbal consultation or letter of consultation. According to Gerber, "this shows that Standard Operating Procedure was not followed." Gerber requested that progressive discipline be followed and the findings overturned or remanded back for another hearing.

Chairman Kiley said he was not judging the happenings. While he understood an Indiana Conservation Officer has jurisdiction outside ordinary environmental and natural resources issues, he wondered why ICO Gerber involved himself in the incident that resulted in the letter of reprimand.

Terri Moore said there might not have been as much tension if ICO Gerber had come down in street clothes rather than first showering and putting on a uniform and gun. "Many times people feel threatened and intimidated by a figure in uniform with a gun."

David Hensel asked Col. Larry Allen what the effect a letter of reprimand is and how long the effect lasts. Col. Allen said that a letter of reprimand is the first step of the progressive disciplinary policy and that the letter is removed two years after issuance if it is not being used in another proceeding. Allen indicated management reserves the right to make the punishment fit the crime and used the example, "If a ICO is driving drunk in a state vehicle, hits someone and kills them, you are not going to give them a verbal warning just because it is the first form of discipline."

Rick Cockrum asked, "in your opinion was this procedure fair?" Col. Allen responded he "absolutely" believed the discipline was fair.

Cockrum moved to affirm the nonfinal order issued by the majority on the panel of ALJs. The motion was seconded by David Hensel. Voting in favor of the motion were Cockrum, Hensel, Moore, Macklin, and Kiley. Goss and Schmelz abstained. The motion carried.

Consideration of Preliminary Adoption of Rule Amendments to Establish a No-Boat Zone Adjacent to "Lake Front Beach" on Lake Michigan, Hammond, Lake County; Administrative Cause Number 99-153L

The Chair reported this item deferred until the December 1999 meeting.

The meeting adjourned at 12:16 p.m.